IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,868

BESSIE LASKY AND JESSE L. LASKY, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petitions for Review of the Decisions of the Tax Court of the United States

MEMORANDUM BRIEF ON BEHALF OF PETITIONERS IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION

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SUMMARY OF JURISDICTIONAL FACTS

On November 28, 1949, the Commissioner of Internal Revenue sent petitioners, by registered mail, notices of deficiencies, in which he determined that the petitioner, Bessie Lasky, owed a deficiency in income tax for the taxable year 1943 in the amount of $224,722.55; and that

the petitioner, Jesse L. Lasky, owed a deficiency for the taxable year 1943 in the amount of $224,515.44 (R. 10 14, 62). Thereafter, on January 9, 1950, petitioners duly filed appeals from said determination with the Tax Court of the United States (R. 7-14). The case was tried before the Tax Court on December 10 and 11, 1951, in Los Angeles California. On April 8, 1954, the Tax Court promulgated its findings of fact and opinion (R. 62-92) and entered its decision ordering and deciding that the taxpayers owe the deficiencies in income tax for the taxable year 1943 in the amount as determined by the Commissioner of Interna Revenue (R. 92-93).

Thereafter, on August 24, 1954, petitioners filed a motion for leave to file a motion to vacate the decisions out o time and a motion to vacate decisions entered April 8 1954 (R. 93-94). On December 13, 1954, the Tax Court entered an order vacating and setting aside the decision of April 8, 1954 and granted the petitioners a further hearing on the merits (R. 135). Thereafter a rehearing of the case was held in Washington, D. C., on January 2 and January 26, 1955 (R. 300-355). At the rehearing the testimony of the accountant for the petitioners was taken for the first time. Also received was the testimony o Gradwell Sears who was, in 1942, the executive vice president of United Artists, in charge of world-wide distribution of pictures, who had been, prior to October 1941 president of a subsidiary of Warner Brothers which distributed Warner Brothers pictures. He had been the distributor of the picture "Sergeant York" for Warner Brothers. The testimony of the president of United Artist in 1942 was also taken. Additional testimony of Jesse L Lasky was received (R. 139-140). On June 30, 1955, the Tax Court in the case of each petitioner entered a memorandum sur order and decision and an order and decision again ordering and deciding upon the rehearing and reconsideration of the case on the merits that there are deficiencies in income tax for the taxable year 1943 as

determined by the Commissioner of Internal Revenue (R. 138-145).

Petitions for review were filed on August 10, 1955, to review the orders and decisions entered by the Tax Court on June 30, 1955 (R. 149).

QUESTION PRESENTED

Did the Tax Court have discretionary power to vacate and set aside its decisions of April 8, 1954, and grant petitioners a further hearing on the merits?

ARGUMENT

It is petitioners' position that the Tax Court had discretionary power to vacate and set aside its decisions of April 8, 1954, and the mere fact that the statutory period during which an appeal may be taken had expired did not deprive the Tax Court of jurisdiction.

Petitioners are not unmindful that some of the cases cited by the respondent hold that because the statutory period during which an appeal may be taken has lapsed deprives the Tax Court or Court of Appeals of jurisdiction. Compare: *Swall* v. *Commissioner*, (CA-9, 1941), 122 F. (2d) 324, 27 AFTR 845; *Denholm & McKay Co.* v. *Commissioner*, (CA-1, 1942), 132 F. (2d) 243, 30 AFTR 572. However, an examination of these cases shows that there is no controlling reason why the Tax Court, like other Courts does not have inherent power to control, amend, open and vacate its decisions to accomplish justice in accordance with the modern trend. It is the position of the petitioners that the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U.S. 131, 81 L. Ed. 557, completely supports their position. There the petitioner on November 25, 1935, filed a petition for a corporate reorganization under Section 77(b) of the bankruptcy act as amended. The respondent filed objections to the petition and a motion to dismiss. On March 2, 1936, the Bankruptcy Court dismissed the petition. On appeal, the Circuit Court of Appeals denied the appeal, holding the petitioner should

have proceeded under Section 25(a) of the Bankruptcy Act instead of 24(b). Petitioner then presented a petition to the District Court sitting in bankruptcy, praying vacation of the order of March 2, 1936, and a rehearing and a review of the matters arising in the proceeding because of errors committed by the court in dismissing its petition. The Court granted the petition to vacate the order and for a rehearing and set aside the order of March 2, 1936, and granted a rehearing and review. After the rehearing was held the Court on May 28, 1936 again sustained the respondent's objection and dismissed the petitions. Petitioner then appealed the order of May 28, 1936, to the Circuit Court of Appeals under Section 25(a) of the Bankruptcy Act. The Circuit Court of Appeals on respondent's motion dismissed the appeal. The Supreme Court held that the power of the Bankruptcy Court to grant or refuse a rehearing rested in its sound discretion and since in the proper exercise of that discretion the Court entertained the application and reheard the case on the merits, its action again dismissing the petition for reorganization was a final order and the appeal therefrom was timely. The Supreme Court opinion in holding that the Bankruptcy Court did not lose power to vacate the judgment merely upon the lapse of the statutory period during which an appeal may be taken completely demolishes the reasoning behind the cases cited by the respondent as to why a special rule should be applicable to the Tax Court of the United States. There it was stated: (p. 136)

> "In the alternative, the respondents argue that where, as here, an adjudication is refused, and the case is retired from the docket, the requirement that an appeal shall be perfected within thirty days from the order of dismissal deprives the court of power to reinstate and rehear the cause after the expiration of the time limited for appeal. They insist that the act contemplates the speedy disposition of causes in bankruptcy and therefore fixes a brief period for appealing from orders therein. To permit the court to rehear a cause after the time for appeal has expired, and to enter a

fresh order which is appealable, would, they urge, tend unduly to extend the proceedings, create uncertainty as to the rights of the debtor and creditors, and ignore the intent of Congress. But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. * * *"

Compare: *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 87 L. Ed. 147.

In the recent case of *Reo Motors, Inc.* v. *Commissioner*, (CA-6, Feb. 23, 1955) 219 F. (2d) 610, the Court of Appeals held that the Tax Court had power to vacate and correct its decisions after the time for appeal had expired. In

support of its opinion it cited with approval the action of the Tax Court in the instant case, saying:

> "We are of the opinion that the Tax Court should have granted petitioner leave to file its substantive motion. Although the Tax Court is not, technically, a federal court, there has been a consistent and growing recognition that, as a practical matter, it is a court exercising inherently judicial functions and having the necessary judicial powers to carry out such functions. See e. g. *Goldsmith* v. *United States Board of Tax Appeals*, 270 U. S. 117 (1926); *Stern* v. *Commissioner*, 215 F. (2d) 701, 706 (3 Cir. 1954). It would appear to follow that the Tax Court has power in extraordinary circumstances to vacate and correct its decision even after it has become final, similar to the jurisdiction of a court to grant a writ of error *coram nobis*. Cf. *United States* v. *Morgan*, 346 U. S. 502 (1954); *United States* v. *Mayer*, 235 U. S. 55 (1914); Rule 60(b), Federal Rules of Civil Procedure.
>
> "This jurisdiction was recognized by the Court of Appeals for the Fifth Circuit in *La Floridienne J. Buttgenbach & Co.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 630 (1933); and very recently, by the Tax Court itself in *Bessie Lasky, Jesse L. Lasky* v. *Commissioner*, Tax Court Dockets Nos. 26396 and 26397 (1954). * * * "

The mere fact that Section 1140, Internal Revenue Code, states when a decision of the Tax Court shall become final can have no unique significance on the power of the Tax Court over its decisions or judgments. There comes a time when the judgment or decision of all courts becomes final so as to preclude an appeal. For instance, a judgment or order of a United States District Court becomes final 30 days after its entry unless motions are made subsequent to its entry which terminate the running of the time for appeal. See Rule 73(a) of the Federal Rules of Civil Procedure. However, the inherent power of the District Court to vacate its judgment after time for appeal has lapsed cannot be doubted.

Some of the decisions cited by the respondent indicate that there is some peculiar necessity in Tax Court cases to know when a decision is "final" in order to inform the Commissioner when he can make an assessment, or allow a credit or make a refund. See *Denholm & McKay Co.* v. *Commissioner,* (CA-1, 1942) 132 F. (2d) 243, 30 AFTR 572. This position is not realistic. There is nothing sacred about an assessment. Assessments, credits, abatements and refunds of taxes are being made all the time. For example, in the case of a jeopardy assessment, the assessment is made and often the tax collected. Yet as the result of a settlement or a Tax Court decision the Commissioner may have to allow credits, make abatements or refunds. No particular administrative problem would arise as the Commissioner would have the power to make the assessment until the decision was reversed or modified. Until the decision was reversed or modified on a proper showing, the assessment would continue in existence. The situation would be exactly the same as exists on an appeal from the Tax Court where the taxpayer elects to pay the deficiency rather than give bond. If the Appellate Court reverses, the taxpayer receives a refund if he has paid the tax. Section 1146, Internal Revenue Code of 1939 provides:

> "SEC. 1146. *Refund, Credit, or Abatement of Amounts Disallowed.* In cases where assessment or collection has not been stayed by the filing of a bond, then if the amount of the deficiency determined by the Tax Court is disallowed in whole or in part by the court, the amount so disallowed shall be credited or refunded to the taxpayer, without the making of claim therefor, or, if collection has not been made, shall be abated."

There is no greater necessity for finality in Tax Court cases than in bankruptcy cases where the rights of a debtor and creditors are involved. In fact, in Tax Court cases no rights of third parties will be involved. In the instant case, no rights of others have vested on the faith of the Court's decision of April 8, 1954. A United States Dis-

trict Court in a tax refund suit would have the power to vacate its judgment under the state of facts that exists in the case at bar. Consequently, it can be seen that from an administrative standpoint the fact that a "final" decision might be reopened or vacated does not create burdensome uncertainty.

At page 21 of his brief, the respondent states:

> "Moreover, if the Tax Court upon redetermination finds a deficiency, the deficiency shall be assessed and paid upon notice and demand when the decision of the Board '*has become final*'."

The respondent then cites Section 272(b) of the Internal Revenue Code and would have this Court believe that the Commissioner is prohibited from making an assessment until after the three-month period within which an appeal may be filed. This is not true. Immediately upon the entry of a Tax Court decision the Commissioner can make an assessment. The only way to stay assessment and collection is by filing a petition for review and giving a bond under Section 1145, Internal Revenue Code. That section provides:

> "SEC. 1145. *Bond to Stay Assessment and Collection.* Notwithstanding any provisions of law imposing restrictions on the assessment and collection of deficiencies, the review under section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect to such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided for by law, or (2) has filed a jeopardy

> bond under the income or estate tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced."

It should also be pointed out that the interpretation of Section 1140 of the Internal Revenue Code does not mean that in all situations the decision becomes "final" within three months from the entry of decision if no petition for review is filed. In *Denholm & McKay Co.* v. *Commissioner*, (CA-1, 1942) 132 F. (2d) 243, 30 AFTR 572, it is stated at page 576:

> "Despite statutory provisions requiring appeals to be taken within a stated period 'after the entry of the judgment' or 'after the judgment is rendered' or words to the same effect, it has long been held that if a petition for rehearing is seasonably presented and entertained by the court, the time limited for appeal does not begin to run until the petition is disposed of. [citing many Supreme Court cases]. The foregoing rule has been applied to timely petitions for rehearing filed in the Board of Tax Appeals; in such cases the period for filing a petition for court review does not begin to run until the Board has disposed of the petition for rehearing. *Griffiths* v. *Commissioner*, 7 Cir. 1931, 50 F. (2d) 782; *Burnet* v. *Lexington Ice & Coal Co.*, 4 Cir. 1933, 62 F. (2d) 906; *Helvering* v. *Continental Oil Co.*, 1933, 63 App. D. C. 5, 68 F. (2d) 750; *Helvering* v. *Louis*, 1935, 64 App. D. C. 263, 77 F. (2d) 386, 99 A. L. R. 620. * * * "

The point is that Section 1140, Internal Revenue Code, dealing with the finality of decisions is interpreted the same as other statutes dealing with finality of judgments. Therefore, the cases relied on by the respondent which base their conclusion on the "peculiar" language of that section are out of step with *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, (1937) 300 U. S. 131, 81 L. Ed. 557.

As pointed out in *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* the granting of a rehearing was discretionary with the Tax Court. Petitioners were before the Tax Court not as a matter of right on their motion to vacate the decisions but by special leave of Court. The Tax Court properly exercised its discretion in vacating the decisions and granting petitioner a further hearing on the merits since the additional evidence proffered showed the decisions of the Tax Court to be wrong.

The respondent's brief cites many cases that involve entirely different factual and procedural situations. For example, respondent cites and relies on *Helvering* v. *Northern Coal Co.,* (1934) 293 U. S. 191, 79 L. Ed. 281, and *R. Simpson & Co.* v. *Commissioner,* (1944) 321 U. S. 225, 88 L. Ed. 688. These cases involve the question whether the Supreme Court could grant a petition for rehearing more than 30 days after its mandate had issued or 25 days after a petition for certiorari had been denied. That is not the issue in this case.

The respondent argues in his brief that no extraordinary circumstances appear which warranted the Tax Court to vacate its decisions of April 8, 1954. This is to say that the facts did not justify the Tax Court in exercising its discretion. The facts which justified the Tax Court in exercising its discretion in vacating its original decisions and granting petitioners a further hearing are clearly set forth in the record. See Appendix B—Statement of Facts in Support of Motion to Vacate Decisions and for Rehearing (Respondent's Brief in Support of Motion for Lack of Jurisdiction). The petitioners represented to the Tax Court that the additional evidence would show that its original opinions and decisions were wrong on the merits. It is still the petitioners' position that the Tax Court's opinions and decisions are erroneous and that the additional evidence and testimony presented at the rehearing fully support petitioners' position. The Tax

Court in its orders and decisions of June 30, 1955, (R. 138-145) briefly sets forth the reasons for its action in vacating the decisions and granting the rehearing.

At page 33 et seq. of his brief, respondent quotes from the case of *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.,* (1937) 300 U. S. 131, 81 L. Ed. 557, where it is said:

> "Where it appears that a rehearing has been granted only for that purpose [to extend the time for appeal] the appeal must be dismissed."

Respondent contends this principle has instant application and cites the case of *Commissioner* v. *Realty Operators,* (1941) 118 F. (2d) 286, 26 AFTR 680. There the admitted purpose of the Court in vacating the decisions was to enter a new decision from which to appeal. No rehearing or reconsideration was requested. This case is clearly distinguishable from the case at bar where the *bona fides* of the situation is shown by the additional testimony and documentary evidence which was introduced at the rehearing, the submission of additional briefs, and the Tax Court's reconsideration of the entire case on the merits and its subsequent entering of memorandum sur order and decisions in the cases. Under these circumstances, it cannot be said that the Tax Court merely vacated its original decision in order to extend the time for appeal. It was pointed out in the *Wayne United Gas Co.* case that a defeated party who applies for a rehearing and does not appeal within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. From necessity, the petitioners had to assume this risk in this case. Fortunately they had good grounds for requesting a further hearing and reconsideration of their case on the merits. The Tax Court exercised its sound discretion and vacated the original decisions and granted a further hearing and reconsidered the case on its merits. The mere fact that petitioners from

necessity were compelled to follow this alternative procedure does not indicate that the Tax Court's action in vacating the original decisions was not bona fide.

At page 28 et seq. of his brief, the respondent discusses the case of *Reo Motors* v. *Commissioner,* (CA-6, 1955) 219 F. (2d) 610. He takes the position the case was not correctly decided by the United States Court of Appeals for the Sixth Circuit and also attempts to point out certain factual differences between that case and the case at bar. Despite this, the Sixth Circuit held that the Tax Court had power to vacate and correct its decisions after the time for appeal had expired and cited with approval the action of the Tax Court in the instant case. Accordingly it must be admitted that the *Reo Motors* case is directly contrary to the position the respondent is urging in this motion to dismiss.

CONCLUSION

The respondent's motion to dismiss for lack of jurisdiction should be denied since the Tax Court had power to exercise its sound discretion and vacate its original decision and grant petitioners a further hearing on the merits.

Respectfully submitted,

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